

Message

From: Connors, Sandra [Connors.Sandra@epa.gov]
Sent: 9/18/2020 4:51:07 PM
To: Wildeman, Anna [wildeman.anna@epa.gov]
CC: Goodin, John [Goodin.John@epa.gov]; Spraul, Greg [Spraul.Greg@epa.gov]; Santell, Stephanie [Santell.Stephanie@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Curtin, James [curtin.james@epa.gov]; Wall, Tom [Wall.Tom@epa.gov]
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

Excellent - much appreciated.

Sandra

Sandra L. Connors
Deputy Director
Office of Wetlands, Oceans, and Watersheds
US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Friday, September 18, 2020 12:44 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Curtin, James <curtin.james@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

I agree with the approach outlined below for DOJ's communication back to Attorney Hall. I have one edit to the response letter that I'll send to Greg shortly.

Thanks,
Anna

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Wednesday, September 16, 2020 3:04 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Curtin, James <curtin.james@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Please find attached a background document of the extensive litigation history here crafted by OGC and OWOW. We're happy to help orchestrate any further OGC engagement if desired or if you'd like to see any of the legal documents referenced in the attached.

Thanks,

Sandra

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From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Tuesday, September 15, 2020 8:06 AM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Thursday, September 3, 2020 1:59 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

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Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)** **Ex. 5 Deliberative Process (DP)** Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

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Message

From: McConkey, Diane [Mcconkey.Diane@epa.gov]
Sent: 9/16/2020 7:14:21 PM
To: Curtin, James [curtin.james@epa.gov]
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Thanks!

From: Curtin, James <curtin.james@epa.gov>
Sent: Wednesday, September 16, 2020 3:11 PM
To: McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: FW: Request for Approval of DOJ Response re: Indian Creek (Telford)

Copying you, Diane.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Wednesday, September 16, 2020 3:04 PM
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Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Curtin, James <curtin.james@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
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Message

From: Connors, Sandra [Connors.Sandra@epa.gov]
Sent: 9/16/2020 7:03:41 PM
To: Wildeman, Anna [wildeman.anna@epa.gov]
CC: Goodin, John [Goodin.John@epa.gov]; Spraul, Greg [Spraul.Greg@epa.gov]; Santell, Stephanie [Santell.Stephanie@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Curtin, James [curtin.james@epa.gov]; Wall, Tom [Wall.Tom@epa.gov]
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)
Attachments: Telford-background paper 9-16-2020 .docx

Privileged

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To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

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Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

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Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

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Message

From: Connors, Sandra [Connors.Sandra@epa.gov]
Sent: 9/16/2020 6:12:12 PM
To: Wall, Tom [Wall.Tom@epa.gov]
CC: Goodin, John [Goodin.John@epa.gov]; Curtin, James [curtin.james@epa.gov]; Havard, James [Havard.James@epa.gov]; Santell, Stephanie [Santell.Stephanie@epa.gov]
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

Excellent- thanks all!

Sandra

Sandra L. Connors
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Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Wednesday, September 16, 2020 2:08 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Sandra, Here is a response drawing from previously reviewed/signed-off summaries. The text re:

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Tuesday, September 15, 2020 8:10 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

Tom - Can you please coordinate with OGC and provide a summary per Anna's request below ASAP? Hopefully just an update to the existing internal paper.

Thanks!

Sandra

Sandra L. Connors

Deputy Director
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To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

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To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

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Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

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Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

Message

From: McConkey, Diane [Mcconkey.Diane@epa.gov]
Sent: 8/12/2020 12:39:40 AM
To: Curtin, James [curtin.james@epa.gov]; Havard, James [Havard.James@epa.gov]; Wall, Tom [Wall.Tom@epa.gov]
CC: Monschein, Eric [Monschein.Eric@epa.gov]; Lewicki, Chris [Lewicki.Chris@epa.gov]; Schwartz, Sara [schwartz.sara@epa.gov]
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Yes, I'm going to ping David on the draft response to the Offer of Judgment on Wednesday morning if there's time during the WLO management weekly, and if not, then during our front office meeting on Thursday morning.

From: Curtin, James <curtin.james@epa.gov>
Sent: Tuesday, August 11, 2020 6:40 PM
To: Havard, James <Havard.James@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

I'd only add that I spoke to Greg Spraul this morning about the Sen. Toomey inquiry. Greg said

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP) If not, he has Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP) He said he'd check in with me before he does that, if indeed it is ever necessary.

I'm fine with the other two responses and have nothing to add. I believe we're still awaiting David F's OK on the Offer of Judgment response.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 11, 2020 6:15 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

Tom – Please see Jim C's note below on an "Offer of Judgment" that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ's draft response.

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

2) A June 23 communication from Senator Toomey's office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin

USEPA Office of General Counsel

Water Law Office

202-564-5482

William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Monday, July 20, 2020 4:36 PM

To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>

Cc: Day, Christopher <Day.Christopher@epa.gov>

Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think Ex. 5 Deliberative Process (DP) ? Let me know if you receive anything. In the meantime, I'll draft a response. It may be Ex. 5 Deliberative Process (DP)

Sarah

From: Erin Thomas <ethomas@hall-associates.com>

Sent: Monday, July 20, 2020 10:29 AM

To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>

Cc: John Hall <jhall@hall-associates.com>; Jacqueline@timoneyknox.com

Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledge the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated "problematic" paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from

the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Wednesday, July 8, 2020 4:29 PM
To: Erin Thomas <ethomas@hall-associates.com>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 — CONFIDENTIAL

Dear Erin,

This email serves as EPA's response to your proposed "Offer of Judgment."

First, Rule 68(a) of the Federal Rules of Civil Procedure ("Offer of Judgment") states that "a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Telford is the plaintiff in this matter. It is not "a party defending against a claim." Your proposal is accordingly not an "Offer of Judgment" as contemplated by Rule 68.

Second, with respect to your assertion that your "Offer of Judgment" letter is "not subject to FRE 408," a party cannot unilaterally waive FRE 408. It is not a privilege; it's a rule of admissibility. That rule states that evidence of "furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim" is "not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." What is more, the rule you have incorrectly invoked, Rule 68, expressly states that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Curtin, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=728048227D024E0CB67932883007A4F9-JCURTIN]
Sent: 9/16/2020 6:30:39 PM
To: McConkey, Diane [Mcconkey.Diane@epa.gov]
Subject: FW: Request for Approval of DOJ Response re: Indian Creek (Telford)
Attachments: Telford-background paper 9-16-2020 .docx

Diane,

Here's what OWOW sent forward to Anna about Telford. Thankfully, they didn't bother me about it.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Wednesday, September 16, 2020 2:09 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Sandra, Here is a response drawing from previously reviewed/signed-off summaries. The text re: **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Tuesday, September 15, 2020 8:10 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

Tom - Can you please coordinate with OGC and provide a summary per Anna's request below ASAP? Hopefully just an update to the existing internal paper.

Thanks!

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Tuesday, September 15, 2020 8:06 AM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Thursday, September 3, 2020 1:59 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

the context of our framework. As presented, however, your settlement proposal is not something that EPA is interested in pursuing."

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)** **Ex. 5 Deliberative Process (DP)** Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Curtin, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=728048227D024E0CB67932883007A4F9-JCURTIN]
Sent: 9/3/2020 6:02:54 PM
To: Wall, Tom [Wall.Tom@epa.gov]; Havard, James [Havard.James@epa.gov]
CC: Connors, Sandra [Connors.Sandra@epa.gov]
Subject: RE: Draft DOJ response to Telford "Offer of Judgement"

No comments.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Thursday, September 03, 2020 1:50 PM
To: Havard, James <Havard.James@epa.gov>
Cc: Connors, Sandra <Connors.Sandra@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: Re: Draft DOJ response to Telford "Offer of Judgement"

Looks good, Jim

Sent from my iPhone

On Sep 3, 2020, at 1:21 PM, Havard, James <Havard.James@epa.gov> wrote:

Here's a draft note on the Offer of Judgment.

Privileged

Hall Associates (on behalf of Telford) sent to DOJ an "Offer of Judgment" in the Indian Creek nutrients TMDL matter and have now asked DOJ to reconsider its initial response. OGC asks if OW is comfortable with DOJ's draft response, which David F has already approved. In response to Hall's "Offer of Judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

OWOW finds the draft DOJ response reasonable. The draft response from DOJ would:

Ex. 5 AC/DP

Here's DOJ's full draft response:

Ex. 5 AC/DP

Separately, as discussed today, OW is also considering EPA's draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response,

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Hall also sent an email to the Administrator forwarding Telford's letter.

Thanks!

Message

From: Spraul, Greg [Spraul.Greg@epa.gov]
Sent: 9/18/2020 5:21:20 PM
To: Goodin, John [Goodin.John@epa.gov]; Santell, Stephanie [Santell.Stephanie@epa.gov]; Connors, Sandra [Connors.Sandra@epa.gov]
Subject: FW: response_telford_09-03-20-yellow-copy.docx
Attachments: response_telford_09-03-20-yellow-copy.docx

FYI – a small edit to Telford response.

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Friday, September 18, 2020 12:49 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: response_telford_09-03-20-yellow-copy.docx

Greg, see the attached edit. Janita, this edit is based on a conv I had with Dave yesterday. He may see Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Have a nice weekend!

Message

From: Connors, Sandra [Connors.Sandra@epa.gov]
Sent: 9/16/2020 6:13:50 PM
To: Goodin, John [Goodin.John@epa.gov]
CC: Santell, Stephanie [Santell.Stephanie@epa.gov]
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)
Attachments: Telford-background paper 9-16-2020 .docx

John - This was largely recycled from an old document that you had shared some time ago with Dave, updated with recent info at the end. Looks good to me - ok if I send on to Anna?

Sandra

Sandra L. Connors
Deputy Director
Office of Wetlands, Oceans, and Watersheds
US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Wednesday, September 16, 2020 2:08 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Sandra, Here is a response drawing from previously reviewed/signed-off summaries. The text re: Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Tuesday, September 15, 2020 8:10 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

Tom - Can you please coordinate with OGC and provide a summary per Anna's request below ASAP? Hopefully just an update to the existing internal paper.

Thanks!

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds
US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Tuesday, September 15, 2020 8:06 AM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Thursday, September 3, 2020 1:59 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)** **Ex. 5 Deliberative Process (DP)** Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors
Deputy Director
Office of Wetlands, Oceans, and Watersheds
US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 9/15/2020 10:01:58 PM
To: Goodin, John [Goodin.John@epa.gov]; Connors, Sandra [Connors.Sandra@epa.gov]
Subject: FW: Telford - some decisionmaking

From: Havard, James <Havard.James@epa.gov>
Sent: Friday, March 01, 2019 1:08 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Lewicki, Chris <Lewicki.Chris@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: FW: Telford

Tom – Telford is hot again. Region (Jen Fields) is now ok with [REDACTED] **Ex. 5 AC/DP**
[REDACTED] **Ex. 5 AC/DP** Let's discuss what coordination we need here. One option may be to share with John whatever Jim C shares with his FO. Jim

From: Curtin, James
Sent: Thursday, February 28, 2019 5:44 PM
To: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>; Rivera, Nina <Rivera.Nina@epa.gov>; Day, Christopher <Day.Christopher@epa.gov>; Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>
Cc: Sincock, Jennifer <Sincock.Jennifer@epa.gov>
Subject: RE: Telford

Thank you, Sarah. That all makes sense. That should allow me to get what I need here.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Thursday, February 28, 2019 3:46 PM
To: Curtin, James <curtin.james@epa.gov>; Rivera, Nina <Rivera.Nina@epa.gov>; Day, Christopher <Day.Christopher@epa.gov>; Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>
Cc: Sincock, Jennifer <Sincock.Jennifer@epa.gov>
Subject: RE: Telford

Yes, thanks, Nina. (And I got your voicemail—I had called before I got your email.)

Jim: Regarding timing, because the report is supposed to be a joint report, we will need to tell Hall in advance of filing that [REDACTED] **Ex. 5 AC/DP**

[REDACTED] **Ex. 5 AC/DP**

In other words, I would like to get the sign off to tell Hall that [REDACTED] **Ex. 5 AC/DP**

[REDACTED] **Ex. 5 AC/DP**

I will draft that [REDACTED] **Ex. 5 AC/DP**

[REDACTED] **Ex. 5 AC/DP**

Sarah

From: Curtin, James <curtin.james@epa.gov>
Sent: Thursday, February 28, 2019 3:32 PM
To: Rivera, Nina <Rivera.Nina@epa.gov>; Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>; Day, Christopher <Day.Christopher@epa.gov>; Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>
Cc: Sincock, Jennifer <Sincock.Jennifer@epa.gov>
Subject: RE: Telford

Jim Havard – Sorry, as you can see, meant to include you on the first “send.”

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Curtin, James
Sent: Thursday, February 28, 2019 3:30 PM
To: Rivera, Nina <Rivera.Nina@epa.gov>; Buckley, Sarah (ENRD) (Sarah.Buckley@usdoj.gov) <Sarah.Buckley@usdoj.gov>; Day, Christopher <Day.Christopher@epa.gov>
Cc: Sincock, Jennifer <Sincock.Jennifer@epa.gov>
Subject: RE: Telford

Thanks, Nina.

I think I should bring the issue back to Matt and David F. for a final check in before we tell Hall and the court EPA wants to: Ex. 5 AC/DP I think the best way for me to “tee that up” is to: Ex. 5 AC/DP
Ex. 5 AC/DP I’d ask them to concur with Ex. 5 AC/DP Because this one
Ex. 5 AC/DP

Sarah/Nina – Can we be sure there ids time for that? I’d like to get it to them Friday (if possible) and no later than Monday.

Jim Havard – Will you need to run this up your chain too?

Nina – In your email, did you mean:

“More precisely, what the 13th floor is ok with ~~if~~ [IS]?

Ex. 5 AC/DP

So my FO will understand the reasons for our decision, can you send me a short statement explaining (1) WHY R3 recommends: Ex. 5 AC/DP

And

(2) WHY R3 recommends Ex. 5 AC/DP
Ex. 5 AC/DP

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Rivera, Nina
Sent: Thursday, February 28, 2019 3:10 PM
To: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov> <Sarah.Buckley@usdoj.gov>; Curtin, James <curtin.james@epa.gov>; Day, Christopher <Day.Christopher@epa.gov>
Cc: Sincock, Jennifer <Sincock.Jennifer@epa.gov>
Subject: FW: Telford

Finally we got the WPD front office to bring this up to the 13th floor. Jen Fields is on board with proceeding to **Ex. 5 AC/DP**
Ex. 5 AC/DP I forwarded Jim's email below hoping that it will suffice, but if not I may reach out to you Jim for a more definite statement. More precisely, what the 13th floor is ok with if:

Ex. 5 AC/DP

From: Curtin, James
Sent: Thursday, February 14, 2019 12:12 PM
To: Day, Christopher <Day.Christopher@epa.gov>; Rivera, Nina <Rivera.Nina@epa.gov>
Cc: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Subject: Telford

Today, I summarized Telford status for GC and David F. Said R3 making imminent decision about whether to **Ex. 5 AC/DP**
Ex. 5 AC/DP Said we'd be relaying decision to court in March status report. Got no push back. Let me know what R3 decides to do.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

Message

From: Connors, Sandra [Connors.Sandra@epa.gov]
Sent: 9/15/2020 12:07:58 PM
To: Wildeman, Anna [wildeman.anna@epa.gov]
CC: Goodin, John [Goodin.John@epa.gov]; Spraul, Greg [Spraul.Greg@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

We will coordinate with OGC and provide ASAP.

Sandra

Sandra L. Connors
Deputy Director
Office of Wetlands, Oceans, and Watersheds
US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
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To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
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Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

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Ex. 5 AC/DP

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Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors
Deputy Director
Office of Wetlands, Oceans, and Watersheds
US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231
connors.sandra@epa.gov

Message

From: Santell, Stephanie [Santell.Stephanie@epa.gov]
Sent: 9/14/2020 4:45:49 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]; Goodin, John [Goodin.John@epa.gov]
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

No worries. I think at this stage John can review your revised version when ready!

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Monday, September 14, 2020 12:44 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

John and Steph - Bringing this back up as propose we add this in to the "Actions in IO" list. Will send a few more comments as well on your new version Steph that I realized after reviewing!

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Connors, Sandra
Sent: Thursday, September 3, 2020 1:58 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)** **Ex. 5 Deliberative Process (DP)** Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 8/21/2020 2:43:19 PM
To: Goodin, John [Goodin.John@epa.gov]; Spraul, Greg [Spraul.Greg@epa.gov]
CC: Havard, James [Havard.James@epa.gov]; Bravo, Antonio [Bravo.Antonio@epa.gov]; Connors, Sandra [Connors.Sandra@epa.gov]; Santell, Stephanie [Santell.Stephanie@epa.gov]
Subject: ACTION: outstanding Telford items
Attachments: 20-000-5532.pdf

Thank you, good to know the latest. I think there is one more incoming that needs a response. This is AX-20-000-5532. I believe { **Ex. 5 Deliberative Process (DP)** }

A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

From: Goodin, John <Goodin.John@epa.gov>
Sent: Friday, August 21, 2020 10:23 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

DELIBERATIVE

Thanks, Tom—Greg and I had a chance to catch up this morning and the current status is that OCIR took care of the Toomey inquiry and Anna has the draft DOJ response for review. Greg—please give a read below to double check that the info from Curtin is not updated from what they previously provided.

Copying Greg and Sandra here in case things move in my absence.
Thanks,

John

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Tuesday, August 18, 2020 6:36 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the "John" to "Ann" and "Jim" to "John"

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 18, 2020 6:32 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F's review. Thanks! Jim

Privileged

John – Please see Jim C's note below on an "Offer of Judgment" that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ's draft response. David F is comfortable with the draft response (see below).

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey's office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

It looks like a reasonable response to me. Again, **Ex. 5 AC/DP**

Thanks! Jim

Message

From: Goodin, John [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3EAC342F280A4B9DB4079C81F66D1913-JGOODIN]
Sent: 9/16/2020 6:24:48 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]
CC: Santell, Stephanie [Santell.Stephanie@epa.gov]
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Yes—I took a quick look. Please copy Curtin and Neugeboren in addition to the others from the incoming, and offer to engage OGC if helpful to discuss or see any of the legal documents. Thanks!

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Wednesday, September 16, 2020 2:14 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

John - This was largely recycled from an old document that you had shared some time ago with Dave, updated with recent info at the end. Looks good to me - ok if I send on to Anna?

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Wednesday, September 16, 2020 2:08 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Sandra, Here is a response drawing from previously reviewed/signed-off summaries. The text re: Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Tuesday, September 15, 2020 8:10 AM
To: Wall, Tom <Wall.Tom@epa.gov>

Cc: Goodin, John <Goodin.John@epa.gov>; Curtin, James <curtin.james@epa.gov>; Havard, James <Havard.James@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>

Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

Tom - Can you please coordinate with OGC and provide a summary per Anna's request below ASAP? Hopefully just an update to the existing internal paper.

Thanks!

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>

Sent: Tuesday, September 15, 2020 8:06 AM

To: Connors, Sandra <Connors.Sandra@epa.gov>

Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>

Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Thursday, September 3, 2020 1:59 PM

To: Wildeman, Anna <wildeman.anna@epa.gov>

Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>

Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)** **Ex. 5 Deliberative Process (DP)** Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Lewicki, Chris [Lewicki.Chris@epa.gov]
Sent: 8/20/2020 5:54:18 PM
To: Havard, James [Havard.James@epa.gov]
Subject: Draft Lit Highlights for your review attached
Attachments: 303d Litigation Highlights 8-20-20 Local copy.docx

Jim

Here are this week's highlights.

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 9/16/2020 7:12:23 PM
To: Havard, James [Havard.James@epa.gov]
Subject: FW: Request for Approval of DOJ Response re: Indian Creek (Telford)
Attachments: Telford-background paper 9-16-2020 .docx

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Wednesday, September 16, 2020 3:04 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Curtin, James <curtin.james@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Please find attached a background document of the extensive litigation history here crafted by OGC and OWOW. We're happy to help orchestrate any further OGC engagement if desired or if you'd like to see any of the legal documents referenced in the attached.

Thanks,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Tuesday, September 15, 2020 8:06 AM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Thursday, September 3, 2020 1:59 PM

To: Wildeman, Anna <wildeman.anna@epa.gov>

Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>

Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

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Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

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Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 9/16/2020 3:44:55 PM
To: Havard, James [Havard.James@epa.gov]
Subject: updated Telford backgrounder
Attachments: Telford-backgrounder 9-16-2020.docx

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

Message

From: Schwartz, Sara [schwartz.sara@epa.gov]
Sent: 8/20/2020 1:24:43 PM
To: Havard, James [Havard.James@epa.gov]
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Thanks for sending, Jim.

From: Havard, James <Havard.James@epa.gov>
Sent: Wednesday, August 19, 2020 2:39 PM
To: Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

FYI

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Tuesday, August 18, 2020 6:36 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the "John" to "Ann" and "Jim" to "John"

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 18, 2020 6:32 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F's review. Thanks! Jim

Privileged

John – Please see Jim C's note below on an "Offer of Judgment" that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ's draft response. David F is comfortable with the draft response (see below).

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

2) A June 23 communication from Senator Toomey's office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Ex. 5 AC/DP

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

It looks like a reasonable response to me. Again, Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.james@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Monday, July 20, 2020 4:36 PM
To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>
Cc: Day, Christopher <Day.Christopher@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think **Ex. 5 Deliberative Process (DP)**? Let me know if you receive anything. In the meantime, I'll draft a response. It may be **Ex. 5 Deliberative Process (DP)**

Sarah

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Monday, July 20, 2020 10:29 AM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com
Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the

modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). In fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledge the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated "problematic" paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Wednesday, July 8, 2020 4:29 PM

To: Erin Thomas <ethomas@hall-associates.com>

Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>

Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA's response to your proposed "Offer of Judgment."

First, Rule 68(a) of the Federal Rules of Civil Procedure ("Offer of Judgment") states that "a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Telford is the plaintiff in this matter. It is not "a party defending against a claim." Your proposal is accordingly not an "Offer of Judgment" as contemplated by Rule 68.

Second, with respect to your assertion that your "Offer of Judgment" letter is "not subject to FRE 408," a party cannot unilaterally waive FRE 408. It is not a privilege; it's a rule of admissibility. That rule states that evidence of "furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim" is "not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." What is more, the rule you have incorrectly invoked, Rule 68, expressly states that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley

Trial Attorney

U.S. Department of Justice

Environment & Natural Resources Division

Environmental Defense Section

4 Constitution Square

150 M Street, NE

Room 4.1126

Washington, DC 20002

sarah.buckley@usdoj.gov

Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>

Sent: Friday, June 26, 2020 4:28 PM

To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>

Cc: John Hall <jhall@hall-associates.com>; Jjacquette@timoneyknox.com

Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 8/24/2020 8:04:36 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]; Robiou, Grace [Robiou.Grace@epa.gov]; Havard, James [Havard.James@epa.gov]
Subject: RE: Items for OGC Weekly

Here is latest on HI and Telford from the litigation highlights I just sent about an hour ago.

Jim - -feel free to add/amend but I think only thing on which to check in with OGC is whether David and Anna discussed

Ex. 5 Deliberative Process (DP)

Indian Creek TMDL - Telford

- David F has approved (and WB thinks is reasonable) relaying to Hall and Associates that EPA:

Ex. 5 Deliberative Process (DP)

- The OW front office has the current draft of EPA's response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

- After the Telford letter was sent to EPA, Senator Toomey's office contacted the Agency encouraging EPA to meet with Telford. EPA's Office of Congressional Affairs communicated the current status of the issue to Toomey's office in a phone call and Toomey's office now has a better understanding of where things stand. At this time Toomey's office is not pressing EPA to have a meeting.

HI info: Looks like **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Monday, August 24, 2020 3:46 PM
To: Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>
Subject: Re: Items for OGC Weekly

Thanks Tom. So is there any need to discuss Ex. 5 Deliberative Process (DP) and Telford is still with Anna right?

Assuming you and Jim will join for call?

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Monday, August 24, 2020 2:59 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>
Cc: Maddox, Donald <Maddox.Donald@epa.gov>
Subject: RE: Items for OGC Weekly

Also: **Ex. 5 Deliberative Process (DP)**

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Monday, August 24, 2020 2:51 PM

To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: Re: Items for OGC Weekly

Also meant to mention the following items I noted in upcoming litigation deadlines so please let me know if should raise today:

Ex. 5 Deliberative Process (DP)

Thanks,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Sent: Monday, August 24, 2020 2:44 PM

To: Connors, Sandra <Connors.Sandra@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: RE: Items for OGC Weekly

Hi Sandra,

Yes, **Ex. 5 Deliberative Process (DP)**

thanks

Mindy Eisenberg

Associate Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4504T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Monday, August 24, 2020 2:43 PM

To: Frazer, Brian <Frazer.Brian@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: Items for OGC Weekly

PRIVILEGED

Any other items?

Ex. 5 Deliberative Process (DP)

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 8/24/2020 6:51:13 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]
CC: Maddox, Donald [Maddox.Donald@epa.gov]; Santell, Stephanie [Santell.Stephanie@epa.gov]; Robiou, Grace [Robiou.Grace@epa.gov]; Havard, James [Havard.James@epa.gov]
Subject: 303(d) litigation highlights
Attachments: 303d Litigation Highlights 8-24-20 to OWOW.docx

Sandra –My apologies for not getting these to you last Friday, when we normally get these to Stephanie - TomW

Message

From: McConkey, Diane [Mcconkey.Diane@epa.gov]
Sent: 8/21/2020 5:11:22 PM
To: Havard, James [Havard.James@epa.gov]
Subject: RE: ACTION: outstanding Telford items

Hi, Jim. That may be beyond my power. We usually suggest items for his conversations with Anna when we have standing meetings with him on Tuesdays and Thursdays. Is it just **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)? I could try an email if **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)

From: Havard, James <Havard.James@epa.gov>
Sent: Friday, August 21, 2020 11:06 AM
To: McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: FW: ACTION: outstanding Telford items

Privileged

Hi Diane – Can you try to make sure David F raises the DOJ response to the offer of judgment in his conversation with Anna this afternoon? Thanks
Jim

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:58 AM
To: Havard, James <Havard.James@epa.gov>
Subject: RE: ACTION: outstanding Telford items

Anna said she has a check in with DavidF today. It would be great if he raised the DOJ response

From: Wall, Tom
Sent: Friday, August 21, 2020 10:53 AM
To: Havard, James <Havard.James@epa.gov>
Subject: RE: ACTION: outstanding Telford items

You did. John's summary below includes status of both the DOJ and Toomey response. **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)

From: Havard, James <Havard.James@epa.gov>
Sent: Friday, August 21, 2020 10:48 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: RE: ACTION: outstanding Telford items

Privileged

Tom – I know you wanted me to provide context, so I did. I'm concerned that **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) What's the next step on getting the OK on the David-F-approved language that DOJ would send in response to the offer of judgment?

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:43 AM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Bravo, Antonio <Bravo.Antonio@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: ACTION: outstanding Telford items

Thank you, good to know the latest. I think there is one more incoming that needs a response. This is AX-20-000-5532. I believe Ex. 5 Deliberative Process (DP)

A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

From: Goodin, John <Goodin.John@epa.gov>
Sent: Friday, August 21, 2020 10:23 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

DELIBERATIVE

Thanks, Tom—Greg and I had a chance to catch up this morning and the current status is that OCIR took care of the Toomey inquiry and Anna has the draft DOJ response for review. Greg—please give a read below to double check that the info from Curtin is not updated from what they previously provided.

Copying Greg and Sandra here in case things move in my absence.
Thanks,
John

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Tuesday, August 18, 2020 6:36 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the "John" to "Ann" and "Jim" to "John"

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 18, 2020 6:32 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F's review. Thanks! Jim

Privileged

John – Please see Jim C's note below on an "Offer of Judgment" that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ's draft response. David F is comfortable with the draft response (see below).

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey's office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

It looks like a reasonable response to me.

Ex. 5 AC/DP

Thanks! Jim

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 9/18/2020 5:08:50 PM
To: McConkey, Diane [Mcconkey.Diane@epa.gov]
Subject: FW: Request for Approval of DOJ Response re: Indian Creek (Telford)

FYI

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, September 18, 2020 12:47 PM
To: Havard, James <Havard.James@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: Fwd: Request for Approval of DOJ Response re: Indian Creek (Telford)

Sent from my iPhone

Begin forwarded message:

From: "Wildeman, Anna" <wildeman.anna@epa.gov>
Date: September 18, 2020 at 12:44:07 PM EDT
To: "Connors, Sandra" <Connors.Sandra@epa.gov>
Cc: "Goodin, John" <Goodin.John@epa.gov>, "Spraul, Greg" <Spraul.Greg@epa.gov>, "Santell, Stephanie" <Santell.Stephanie@epa.gov>, "Aguirre, Janita" <Aguirre.Janita@epa.gov>, "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>, "Curtin, James" <curtin.james@epa.gov>, "Wall, Tom" <Wall.Tom@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

I agree with Ex. 5 Deliberative Process (DP) I have one edit to the response letter that I'll send to Greg shortly.

Thanks,
Anna

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Wednesday, September 16, 2020 3:04 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Curtin, James <curtin.james@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Please find attached a background document of the extensive litigation history here crafted by OGC and OWOW. We're happy to help orchestrate any further OGC engagement if desired or if you'd like to see any of the legal documents referenced in the attached.

Thanks,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Tuesday, September 15, 2020 8:06 AM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Thursday, September 3, 2020 1:59 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 8/21/2020 2:57:32 PM
To: Wall, Tom [Wall.Tom@epa.gov]
Subject: RE: ACTION: outstanding Telford items

Privileged

OK good. If this is clear enough, we should get a response from Anna on both the DOJ letter, and the EPA response to Telford (and Hall). Do you think **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP) I'd like to think so.

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:53 AM
To: Havard, James <Havard.James@epa.gov>
Subject: RE: ACTION: outstanding Telford items

You did. John's summary below includes status of both the DOJ and Toomey response. **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

From: Havard, James <Havard.James@epa.gov>
Sent: Friday, August 21, 2020 10:48 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: RE: ACTION: outstanding Telford items

Privileged

Tom – I know you wanted me to provide context, so I did. I'm concerned that **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) What's the next step on getting the OK on the David-F-approved language that DOJ would send in response to the offer of judgment?

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:43 AM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Bravo, Antonio <Bravo.Antonio@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
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Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

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Cc: Havard, James <Havard.James@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

DELIBERATIVE

Thanks, Tom—Greg and I had a chance to catch up this morning and the current status is that OCIR took care of the Toomey inquiry and Anna has the draft DOJ response for review. Greg—please give a read below to double check that the info from Curtin is not updated from what they previously provided.

Copying Greg and Sandra here in case things move in my absence.

Thanks,
John

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Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the “John” to “Ann”a and “Jim” to “John”

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Sent: Tuesday, August 18, 2020 6:32 PM
To: Wall, Tom <Wall.Tom@epa.gov>
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Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F’s review. Thanks! Jim

Privileged

John – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response. David F is comfortable with the draft response (see below).

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Ex. 5 Deliberative Process (DP)

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Ex. 5 AC/DP

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Ex. 5 AC/DP

Ex. 5 AC/DP

It looks like a reasonable response to me. Again, **Ex. 5 AC/DP**

Thanks! Jim

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 9/16/2020 4:24:16 PM
To: Wall, Tom [Wall.Tom@epa.gov]
Subject: RE: updated Telford backgrounder
Attachments: Telford-backgrounder 9-16-2020 jh.docx

Privileged

Tom – Looks largely taken from the previous papers, which had been reviewed extensively by the Region. And the new material is largely from OGC emails. I added one suggestion: Ex. 5 Deliberative Process (DP)

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Wednesday, September 16, 2020 11:45 AM
To: Havard, James <Havard.James@epa.gov>
Subject: updated Telford backgrounder

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 9/9/2020 3:58:42 PM
To: Lewicki, Chris [Lewicki.Chris@epa.gov]; Schwartz, Sara [schwartz.sara@epa.gov]
CC: McConkey, Diane [Mcconkey.Diane@epa.gov]
Subject: FW: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

FYI – will let you know what I hear back

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Thursday, September 03, 2020 1:59 PM
To: Wall, Tom <Wall.Tom@epa.gov>; Havard, James <Havard.James@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>
Subject: Fw: Request for Approval of DOJ Response re: Indian Creek (Telford)

Thank you!

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Connors, Sandra
Sent: Thursday, September 3, 2020 1:58 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, which would be **Ex. 5 Deliberative Process (DP)** Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 9/3/2020 1:22:28 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]; Wall, Tom [Wall.Tom@epa.gov]; Robiou, Grace [Robiou.Grace@epa.gov]
Subject: RE: Items for OWOW Biweekly Today
Attachments: FW: DC Bacteria plaintiffs request for meeting with R3 and DC; FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Good morning. Please see notes in red.

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Thursday, September 03, 2020 8:46 AM
To: Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>
Subject: Items for OWOW Biweekly Today

Here's what I'm planning to share/highlight for 303d at biweekly today. If you have additional info/background (particularly for Ex. 5 Deliberative Process (DP)) that would be great.

-
-
-
-
-

Ex. 5 Deliberative Process (DP)

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Wall, Tom [Wall.Tom@epa.gov]
Sent: 9/2/2020 3:10:52 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]; Havard, James [Havard.James@epa.gov]
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Here is the most recent info I have. Added highlight that indicates (indirectly) that Anna has the DOJ response. Also highlighted the specific text of the draft DOJ response at end of the email below. - TomW

From: Goodin, John <Goodin.John@epa.gov>
Sent: Friday, August 21, 2020 10:23 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

DELIBERATIVE

Thanks, Tom—Greg and I had a chance to catch up this morning and the current status is that OCIR took care of the Toomey inquiry and Anna has the draft DOJ response for review. Greg—please give a read below to double check that the info from Curtin is not updated from what they previously provided.

Copying Greg and Sandra here in case things move in my absence.

Thanks,
John

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Tuesday, August 18, 2020 6:36 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the “John” to “Ann”a and “Jim” to “John”

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 18, 2020 6:32 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F’s review. Thanks! Jim

Privileged

John – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response. David F is comfortable with the draft response (see below).

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

2) A June 23 communication from Senator Toomey's office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

It looks like a reasonable response to me. Again, **Ex. 5 AC/DP**

Thanks! Jim

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 9/2/2020 2:57:22 PM
To: Connors, Sandra [Connors.Sandra@epa.gov]; Wall, Tom [Wall.Tom@epa.gov]
CC: Lewicki, Chris [Lewicki.Chris@epa.gov]; Monschein, Eric [Monschein.Eric@epa.gov]; Schwartz, Sara [schwartz.sara@epa.gov]
Subject: FW: Items for OGC Weekly

Getting the latest on Telford to the top of the email. I had sent several messages with this information up through Tom. I don't know if John has shared the response to the Offer of Judgment with Anna. I have highlighted the need to get Anna's review of it.

I believe Greg Spraul has shared the draft Ross response with Anna.

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Monday, August 24, 2020 4:05 PM
To: Connors, Sandra <Connors.Sandra@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>
Subject: RE: Items for OGC Weekly

Here is latest on HI and Telford from the litigation highlights I just sent about an hour ago.

Jim - -feel free to add/amend but I think only thing on which to check in with OGC is whether David and Anna discussed

Ex. 5 Deliberative Process (DP)

Indian Creek TMDL - Telford

- David F has approved (and WB thinks is reasonable) relaying to Hall and Associates that EPA:

Ex. 5 AC/DP

Ex. 5 AC/DP

- The OW front office has the current draft of EPA's response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response, **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

- After the Telford letter was sent to EPA, Senator Toomey's office contacted the Agency encouraging EPA to meet with Telford. EPA's Office of Congressional Affairs communicated the current status of the issue to Toomey's office in a phone call and Toomey's office now has a better understanding of where things stand. At this time Toomey's office is not pressing EPA to have a meeting.

HI info: Looks like Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Monday, August 24, 2020 3:46 PM
To: Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>
Subject: Re: Items for OGC Weekly

Thanks Tom. So is there any need to Ex. 5 Deliberative Process (DP) and Telford is still with Anna right?

Assuming you and Jim will join for call?

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wall, Tom <Wall.Tom@epa.gov>

Sent: Monday, August 24, 2020 2:59 PM

To: Connors, Sandra <Connors.Sandra@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: RE: Items for OGC Weekly

Also: **Ex. 5 Deliberative Process (DP)**

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Monday, August 24, 2020 2:51 PM

To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: Re: Items for OGC Weekly

Also meant to mention the following items I noted in upcoming litigation deadlines so please let me know if should raise today:

Ex. 5 Deliberative Process (DP)

Thanks,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Sent: Monday, August 24, 2020 2:44 PM

To: Connors, Sandra <Connors.Sandra@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: RE: Items for OGC Weekly

ED_005158_00000245-00003

Hi Sandra,

Yes, **Ex. 5 Deliberative Process (DP)**

thanks

Mindy Eisenberg

Associate Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4504T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Monday, August 24, 2020 2:43 PM

To: Frazer, Brian <Frazer.Brian@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Havard, James <Havard.James@epa.gov>

Cc: Maddox, Donald <Maddox.Donald@epa.gov>

Subject: Items for OGC Weekly

PRIVILEGED

Any other items?

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 8/18/2020 7:50:43 PM
To: Wall, Tom [Wall.Tom@epa.gov]
CC: Robiou, Grace [Robiou.Grace@epa.gov]; Monschein, Eric [Monschein.Eric@epa.gov]
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Attachments: Telford Case Filings; Draft DOJ response to Hall Associates_8_7_20_JC.docx; FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

This draft is approved by David F and is consistent with the draft I previously sent up in my message summarizing the Telford status. I include that message attached.

From: Curtin, James <curtin.james@epa.gov>
Sent: Friday, August 14, 2020 2:55 PM
To: Havard, James <Havard.James@epa.gov>
Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim,

David F is OK with the attached draft DOJ response re the Offer of Judgment. I made one small change (we -> EPA) in response to one his one comments (yellow) and also highlighted Ex. 5 AC/DP

Ex. 5 AC/DP

Is your management OK with the draft now? If so, I'll send this draft to DOJ for transmittal to H&A.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 11, 2020 6:15 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

Tom – Please see Jim C's note below on an "Offer of Judgment" that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ's draft response.

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

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On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

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Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>
Sent: Friday, August 07, 2020 3:34 PM
To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>
Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Monday, July 20, 2020 4:36 PM
To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>
Cc: Day, Christopher <Day.Christopher@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think **Ex. 5 Deliberative Process (DP)**? Let me know if you receive anything. In the meantime, I'll draft a response. It may be **Ex. 5 Deliberative Process (DP)**

Sarah

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Monday, July 20, 2020 10:29 AM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledged the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated "problematic" paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.

2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Wednesday, July 8, 2020 4:29 PM
To: Erin Thomas <ethomas@hall-associates.com>
Cc: John Hall <jhall@hall-associates.com>; Jjacquette@timoneyknox.com <Jjacquette@timoneyknox.com>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA's response to your proposed "Offer of Judgment."

First, Rule 68(a) of the Federal Rules of Civil Procedure ("Offer of Judgment") states that "a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Telford is the plaintiff in this matter. It is not "a party defending against a claim." Your proposal is accordingly not an "Offer of Judgment" as contemplated by Rule 68.

Second, with respect to your assertion that your "Offer of Judgment" letter is "not subject to FRE 408," a party cannot unilaterally waive FRE 408. It is not a privilege; it's a rule of admissibility. That rule states that evidence of "furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim" is "not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." What is more, the rule you have incorrectly invoked, Rule 68, expressly states that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 8/11/2020 10:14:41 PM
To: Wall, Tom [Wall.Tom@epa.gov]
CC: Monschein, Eric [Monschein.Eric@epa.gov]; Lewicki, Chris [Lewicki.Chris@epa.gov]; Schwartz, Sara [schwartz.sara@epa.gov]; McConkey, Diane [Mcconkey.Diane@epa.gov]; Curtin, James [curtin.james@epa.gov]
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Attachments: Telford Case Filings

Privileged

Tom – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response.

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey’s office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall’s “offer of judgment,” DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff

here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin

USEPA Office of General Counsel

Water Law Office

202-564-5482

William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Monday, July 20, 2020 4:36 PM
To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>
Cc: Day, Christopher <Day.Christopher@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think [Ex. 5 Deliberative Process (DP)]? Let me know if you receive anything. In the meantime, I'll draft a response. It may be [Ex. 5 Deliberative Process (DP)]

Sarah

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Monday, July 20, 2020 10:29 AM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacqueline@timoneyknox.com
Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledged the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated “problematic” paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP's acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be "natural" by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP's narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env'tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Wednesday, July 8, 2020 4:29 PM
To: Erin Thomas <ethomas@hall-associates.com>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA’s response to your proposed “Offer of Judgment.”

First, Rule 68(a) of the Federal Rules of Civil Procedure (“Offer of Judgment”) states that “a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” Telford is the plaintiff in this matter. It is not “a party defending against a claim.” Your proposal is accordingly not an “Offer of Judgment” as contemplated by Rule 68.

Second, with respect to your assertion that your “Offer of Judgment” letter is “not subject to FRE 408,” a party cannot unilaterally waive FRE 408. It is not a privilege; it’s a rule of admissibility. That rule states that evidence of “furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim” is “not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.” What is more, the rule you have incorrectly invoked, Rule 68, expressly states that “[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs.”

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 8/21/2020 4:59:59 PM
To: Wall, Tom [Wall.Tom@epa.gov]
CC: Lewicki, Chris [Lewicki.Chris@epa.gov]; Monschein, Eric [Monschein.Eric@epa.gov]
Subject: WB Lit highlights
Attachments: 303d Litigation Highlights 8-21-20 Local copy.docx

Privileged

Tom – Please see draft highlights for your review. Please send on or let us know if you have questions. I'm out of the office, but can be reached at Ex. & Personal Privacy (PP) Chris and Eric are generally available. Thanks Jim

Message

From: Havard, James [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9350676809E8403994F1DFC2B7BFDCFE-JHAVARD]
Sent: 8/21/2020 3:05:56 PM
To: Wall, Tom [Wall.Tom@epa.gov]
Subject: RE: ACTION: outstanding Telford items

Good idea. I just emailed Diane.

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:58 AM
To: Havard, James <Havard.James@epa.gov>
Subject: RE: ACTION: outstanding Telford items

Anna said she has a check in with DavidF today. It would be great if he raised the DOJ response

From: Wall, Tom
Sent: Friday, August 21, 2020 10:53 AM
To: Havard, James <Havard.James@epa.gov>
Subject: RE: ACTION: outstanding Telford items

You did. John's summary below includes status of both the DOJ and Toomey response. **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

From: Havard, James <Havard.James@epa.gov>
Sent: Friday, August 21, 2020 10:48 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: RE: ACTION: outstanding Telford items

Privileged

Tom – I know you wanted me to provide context, so I did. I'm concerned that **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) What's the next step on getting the OK on the David-F-approved language that DOJ would send in response to the offer of judgment?

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:43 AM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Bravo, Antonio <Bravo.Antonio@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: ACTION: outstanding Telford items

Thank you, good to know the latest. I think there is one more incoming that needs a response. This is AX-20-000-5532. I believe **Ex. 5 Deliberative Process (DP)**

A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

From: Goodin, John <Goodin.John@epa.gov>
Sent: Friday, August 21, 2020 10:23 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

DELIBERATIVE

Thanks, Tom—Greg and I had a chance to catch up this morning and the current status is that OCIR took care of the Toomey inquiry and Anna has the draft DOJ response for review. Greg—please give a read below to double check that the info from Curtin is not updated from what they previously provided.

Copying Greg and Sandra here in case things move in my absence.
Thanks,
John

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Tuesday, August 18, 2020 6:36 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the “John” to “Ann”a and “Jim” to “John”

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 18, 2020 6:32 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F’s review. Thanks! Jim

Privileged

John – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response. David F is comfortable with the draft response (see below).

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey’s office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall’s “offer of judgment,” DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

Ex. 5 AC/DP

It looks like a reasonable response to me. Again, **Ex. 5 AC/DP**

Thanks! Jim

Message

From: Wildeman, Anna [wildeman.anna@epa.gov]
Sent: 9/16/2020 10:57:31 PM
To: Ross, David P [ross.davidp@epa.gov]
Subject: FW: Request for Approval of DOJ Response re: Indian Creek (Telford)
Attachments: Telford-background paper 9-16-2020 .docx

From: Connors, Sandra <Connors.Sandra@epa.gov>
Sent: Wednesday, September 16, 2020 3:04 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Curtin, James <curtin.james@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Subject: Re: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Please find attached a background document of the extensive litigation history here crafted by OGC and OWOW. We're happy to help orchestrate any further OGC engagement if desired or if you'd like to see any of the legal documents referenced in the attached.

Thanks,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Tuesday, September 15, 2020 8:06 AM
To: Connors, Sandra <Connors.Sandra@epa.gov>
Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: RE: Request for Approval of DOJ Response re: Indian Creek (Telford)

Can you please provide a refresher background paper on the Telford TMDL litigation? Timeline, issues, history of settlement discussions, etc.

From: Connors, Sandra <Connors.Sandra@epa.gov>

Sent: Thursday, September 3, 2020 1:59 PM

To: Wildeman, Anna <wildeman.anna@epa.gov>

Cc: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>

Subject: Request for Approval of DOJ Response re: Indian Creek (Telford)

Privileged

Anna - Following up on our discussion at the OWOW Biweekly today, we would like to get your approval for DOJ to respond as proposed below in the Indian Creek nutrients TMDL matter. Hall Associates (on behalf of plaintiff Telford) previously sent to DOJ an "Offer of Judgment" in this matter and DOJ responded that an offer of judgment is not a proper tool for this case. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the response to the Offer of Judgment.

DOJ proposes to respond as follows:

Ex. 5 AC/DP

OGC (David F) and OWOW believe this is a reasonable approach and support the following language for responding:

Ex. 5 AC/DP

Separately, and as discussed today, Greg has shared with you a draft response to Telford's June 8th letter to the Administrator asking to meet regarding the Indian Creek TMDL. The draft response:

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Hall also sent an email to the Administrator forwarding Telford's letter.

Please let us know if you are comfortable with DOJ responding in this manner or if you have any questions or further information we can provide.

Thank you,

Sandra

Sandra L. Connors

Deputy Director
Office of Wetlands, Oceans, and Watersheds

US Environmental Protection Agency, MC 4501T
1200 Pennsylvania Avenue, WJCW 7130A
Washington, DC 20460
(202)564-4231

connors.sandra@epa.gov

Message

From: Aguirre, Janita [Aguirre.Janita@epa.gov]
Sent: 9/4/2020 1:23:03 PM
To: Ross, David P [ross.davidp@epa.gov]
CC: Braschayko, Kelley [braschayko.kelley@epa.gov]
Subject: REFRESH - FW: For signature: response Telford (AX-20-000-5532)
Attachments: response_telford_09-03-20-for-sig.pdf; incoming_telford_tmdl_06-08-20.pdf; response_telford_05-30-19.pdf; incoming_telford_03-25-19.pdf

Refreshing this just in case it was lost in your inbox yesterday evening.

Thank you,
Janita

Janita Aguirre – Special Assistant to David Ross and Anna Wildeman
U.S. Environmental Protection Agency | Office of Water | Office of the Assistant Administrator
Phone: (202) 566-1149 | Email: aguirre.janita@epa.gov

From: Aguirre, Janita
Sent: Thursday, September 03, 2020 4:48 PM
To: Ross, David P <ross.davidp@epa.gov>
Cc: Braschayko, Kelley <braschayko.kelley@epa.gov>
Subject: For signature: response Telford (AX-20-000-5532)

Draft, Deliberative,

Hi Dave,

Please see the attached response for your review and signature. Anna has reviewed and cleared the attached response. Because this issue is in litigation, Ex. 5 Deliberative Process (DP) If you have any questions or edits, please let me know. When you are ready, add your signature to attachment 1.

For convenience, I'm also attaching our letter exchange from last year.

Thank you,
Janita

Janita Aguirre – Special Assistant to David Ross and Anna Wildeman
U.S. Environmental Protection Agency | Office of Water | Office of the Assistant Administrator
Phone: (202) 566-1149 | Email: aguirre.janita@epa.gov

Message

From: Aguirre, Janita [Aguirre.Janita@epa.gov]
Sent: 9/18/2020 8:30:22 PM
To: Ross, David P [ross.davidp@epa.gov]
CC: Wildeman, Anna [wildeman.anna@epa.gov]; Braschayko, Kelley [braschayko.kelley@epa.gov]
Subject: Updated - For review/signature: response Telford (AX-20-000-5532)
Attachments: response_telford_09-18-2020-yellow-copy.docx; response_telford_09-18-2020.pdf; incoming_telford_tmdl_06-08-20.pdf; response_telford_05-30-19.pdf; incoming_telford_03-25-19.pdf

Draft, Deliberative,

Hi Dave,

Please see the updated response for your review. Attachment 1 includes redline edits for your consideration. If you are comfortable with the updated text and you are ready to sign, please add your signature to Attachment 2. If you have any questions or edits, please let us know.

For convenience, I'm also attaching our letter exchange from last year.

Thank you,
Janita

Janita Aguirre – Special Assistant to David Ross and Anna Wildeman
U.S. Environmental Protection Agency | Office of Water | Office of the Assistant Administrator
Phone: (202) 566-1149 | Email: aguirre.janita@epa.gov

From: Aguirre, Janita
Sent: Thursday, September 03, 2020 4:48 PM
To: Ross, David P <ross.davidp@epa.gov>
Cc: Braschayko, Kelley <braschayko.kelley@epa.gov>
Subject: For signature: response Telford (AX-20-000-5532)

Draft, Deliberative,

Hi Dave,

Please see the attached response for your review and signature. Anna has reviewed and cleared the attached response. Because this issue is in litigation, Ex. 5 Deliberative Process (DP) If you have any questions or edits, please let me know. When you are ready, add your signature to attachment 1.

For convenience, I'm also attaching our letter exchange from last year.

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U.S. Environmental Protection Agency | Office of Water | Office of the Assistant Administrator
Phone: (202) 566-1149 | Email: aguirre.janita@epa.gov

Message

From: Voigt, Gregory [Voigt.Gregory@epa.gov]
Sent: 9/8/2020 8:04:50 PM
To: Schwartz, Sara [schwartz.sara@epa.gov]
Subject: RE: For Sara: NEED LIT HIGHLIGHT RE: Telford

Thanks Sara.

Gregory Voigt
USEPA Region III
1650 Arch Street, Mail Code 3WD42
Philadelphia, PA 19103
215-814-5737

From: Schwartz, Sara <schwartz.sara@epa.gov>
Sent: Tuesday, September 8, 2020 4:02 PM
To: Voigt, Gregory <Voigt.Gregory@epa.gov>
Subject: FW: For Sara: NEED LIT HIGHLIGHT RE: Telford

Hi Greg,

Here is a good summary of where things stand with the Toomey inquiry (you can disregard the offer of judgement info). The first email below is what we sent as a highlight to Tom about a month ago. The second email below provides some of the original email content used to piece together the highlights. Let me know if you have any follow up questions.

Sara

From: Lewicki, Chris <Lewicki.Chris@epa.gov>
Sent: Friday, August 14, 2020 11:53 AM
To: Schwartz, Sara <schwartz.sara@epa.gov>
Subject: FW: For Sara: NEED LIT HIGHLIGHT RE: Telford

Thanks Sara. Very helpful summary. I've edited it to the following, which I will include in highlights. Havard will likely edit further

Indian Creek Nutrient TMDL, Telford Update

Ex. 5 Deliberative Process (DP)

From: Schwartz, Sara <schwartz.sara@epa.gov>
Sent: Friday, August 14, 2020 11:06 AM
To: Lewicki, Chris <Lewicki.Chris@epa.gov>
Subject: RE: For Sara: NEED LIT HIGHLIGHT RE: Telford

Privileged and confidential

Hi Chris,

Here is my stab at a highlight. Let me know if I can help edit this further. I've included the raw text from the emails I pulled so you can refer back to the exact wording.

Telford Update

Ex. 5 Deliberative Process (DP)

Original emails:

Offer of Judgement: Hall Associates (on behalf of Telford) sent DOJ "offer of judgment." DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:...Currently being reviewed by OGC management.

Ex. 5 AC/DP

From Jim C re: Senator Toomey inquiry: On June 23 OCIR received communication from Senator Toomey's office requesting that EPA meet with Telford. After speaking with Anna W, the plan is to **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

If not, he has

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

He said he'd check in with me before he does that, if

indeed it is ever necessary.

From: Lewicki, Chris <Lewicki.Chris@epa.gov>
Sent: Friday, August 14, 2020 10:23 AM
To: Schwartz, Sara <schwartz.sara@epa.gov>
Subject: For Sara: NEED LIT HIGHLIGHT RE: Telford
Importance: High

Hi Sara

Can you please send me a draft highlight on Telford. Sorry for not asking sooner. I need it by noon, if possible. If not possible, let me know.

Please cover 1) Offer of Judgement and 2) Sen Toomey inquiry

Don't bother with background. John G knows this case well enough by now.

Don't bother sending to Curtin for review. He is vacationing.

I'll review it, in his place.

THANKS

From: Curtin, James <curtin.james@epa.gov>
Sent: Tuesday, August 11, 2020 6:40 PM
To: Havard, James <Havard.James@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

I'd only add that I spoke to Greg Spraul this morning about the Sen. Toomey inquiry. Greg said **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

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Ex. 5 Deliberative Process (DP) He said he'd check in with me before he does that, if indeed it is ever necessary.

I'm fine with the other two responses and have nothing to add. I believe we're still awaiting David F's OK on the Offer of Judgment response.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482

From: Havard, James <Havard.James@epa.gov>

Sent: Tuesday, August 11, 2020 6:15 PM

To: Wall, Tom <Wall.Tom@epa.gov>

Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Curtin, James <curtin.james@epa.gov>

Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

Tom – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response.

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey’s office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall’s “offer of judgment,” DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Monday, July 20, 2020 4:36 PM

To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>

Cc: Day, Christopher <Day.Christopher@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think **Ex. 5 Deliberative Process (DP)** A? Let me know if you receive anything. In the meantime, I'll draft a response. It may be **Ex. 5 Deliberative Process (DP)**

Sarah

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Monday, July 20, 2020 10:29 AM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacqueline@timoneyknox.com
Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledged the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated “problematic” paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.

6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Wednesday, July 8, 2020 4:29 PM

To: Erin Thomas <ethomas@hall-associates.com>

Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>

Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA’s response to your proposed “Offer of Judgment.”

First, Rule 68(a) of the Federal Rules of Civil Procedure (“Offer of Judgment”) states that “a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” Telford is the plaintiff in this matter. It is not “a party defending against a claim.” Your proposal is accordingly not an “Offer of Judgment” as contemplated by Rule 68.

Second, with respect to your assertion that your “Offer of Judgment” letter is “not subject to FRE 408,” a party cannot unilaterally waive FRE 408. It is not a privilege; it’s a rule of admissibility. That rule states that evidence of “furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim” is “not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.” What is more, the rule you have incorrectly invoked, Rule 68, expressly states that “[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs.”

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in

settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Schwartz, Sara [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=10D40C70FBA0414BACCF77D072222668-SCHWARTZ, S]
Sent: 8/14/2020 5:19:47 PM
To: Lewicki, Chris [Lewicki.Chris@epa.gov]
Subject: RE: For Sara: NEED LIT HIGHLIGHT RE: Telford

Okay thanks Chris. Glad I could help get it started.

Sara

From: Lewicki, Chris <Lewicki.Chris@epa.gov>
Sent: Friday, August 14, 2020 11:53 AM
To: Schwartz, Sara <schwartz.sara@epa.gov>
Subject: FW: For Sara: NEED LIT HIGHLIGHT RE: Telford

Thanks Sara. Very helpful summary. I've edited it to the following, which I will include in highlights. Havard will likely edit further

Indian Creek Nutrient TMDL, Telford Update

Ex. 5 Deliberative Process (DP)

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Ex. 5 Deliberative Process (DP)

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Original emails:

Offer of Judgement: Hall Associates (on behalf of Telford) sent DOJ “offer of judgment.” DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:...Currently being reviewed by OGC management.

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Ex. 5 Deliberative Process (DP)

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Hi Sara

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Please cover 1) Offer of Judgement and 2) Sen Toomey inquiry

Don't bother with background. John G knows this case well enough by now.

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I'll review it, in his place.

THANKS

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Jim Curtin

USEPA Office of General Counsel

Water Law Office

202-564-5482

William Jefferson Clinton North Rm. 7451

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Sent: Friday, August 07, 2020 3:34 PM

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Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

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I'm simultaneously running this by David F and R3.

Thanks.

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Jim Curtin

USEPA Office of General Counsel

Water Law Office

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William Jefferson Clinton North Rm. 7451

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Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

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From: Erin Thomas <ethomas@hall-associates.com>

Sent: Monday, July 20, 2020 10:29 AM

To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>

Cc: John Hall <jhall@hall-associates.com>; Jacqueline@timoneyknox.com

Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledge the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated "problematic" paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from

the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Wednesday, July 8, 2020 4:29 PM
To: Erin Thomas <ethomas@hall-associates.com>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 — CONFIDENTIAL

Dear Erin,

This email serves as EPA's response to your proposed "Offer of Judgment."

First, Rule 68(a) of the Federal Rules of Civil Procedure ("Offer of Judgment") states that "a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Telford is the plaintiff in this matter. It is not "a party defending against a claim." Your proposal is accordingly not an "Offer of Judgment" as contemplated by Rule 68.

Second, with respect to your assertion that your "Offer of Judgment" letter is "not subject to FRE 408," a party cannot unilaterally waive FRE 408. It is not a privilege; it's a rule of admissibility. That rule states that evidence of "furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim" is "not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." What is more, the rule you have incorrectly invoked, Rule 68, expressly states that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Schwartz, Sara [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=10D40C70FBA0414BACCF77D072222668-SCHWARTZ, S]
Sent: 8/14/2020 2:49:50 PM
To: Lewicki, Chris [Lewicki.Chris@epa.gov]
Subject: RE: For Sara: NEED LIT HIGHLIGHT RE: Telford

No worries. Working on it. Will send soon.

From: Lewicki, Chris <Lewicki.Chris@epa.gov>
Sent: Friday, August 14, 2020 10:23 AM
To: Schwartz, Sara <schwartz.sara@epa.gov>
Subject: For Sara: NEED LIT HIGHLIGHT RE: Telford
Importance: High

Hi Sara

Can you please send me a draft highlight on Telford. Sorry for not asking sooner. I need it by noon, if possible. If not possible, let me know.

Please cover 1) Offer of Judgement and 2) Sen Toomey inquiry

Don't bother with background. John G knows this case well enough by now.

Don't bother sending to Curtin for review. He is vacationing.

I'll review it, in his place.

THANKS

From: Curtin, James <curtin.james@epa.gov>
Sent: Tuesday, August 11, 2020 6:40 PM
To: Havard, James <Havard.James@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

I'd only add that I spoke to Greg Spraul this morning about the Sen. Toomey inquiry. Greg said

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

If not, he has

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

He said he'd check in with me before he does that, if indeed it is ever necessary.

I'm fine with the other two responses and have nothing to add. I believe we're still awaiting David F's OK on the Offer of Judgment response.

Jim

Jim Curtin

USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Havard, James <Havard.James@epa.gov>

Sent: Tuesday, August 11, 2020 6:15 PM

To: Wall, Tom <Wall.Tom@epa.gov>

Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Curtin, James <curtin.james@epa.gov>

Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

Tom – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response.

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey’s office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Monday, July 20, 2020 4:36 PM
To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>
Cc: Day, Christopher <Day.Christopher@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think [Ex. 5 Deliberative Process (DP)] Let me know if you receive anything. In the meantime, I'll draft a response. It may be [Ex. 5 Deliberative Process (DP)]

Sarah

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Monday, July 20, 2020 10:29 AM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacqueline@timoneyknox.com
Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledged the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

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1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP's acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
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Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

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Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be "natural" by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP's narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env'tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Wednesday, July 8, 2020 4:29 PM
To: Erin Thomas <ethomas@hall-associates.com>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA’s response to your proposed “Offer of Judgment.”

First, Rule 68(a) of the Federal Rules of Civil Procedure (“Offer of Judgment”) states that “a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” Telford is the plaintiff in this matter. It is not “a party defending against a claim.” Your proposal is accordingly not an “Offer of Judgment” as contemplated by Rule 68.

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Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453AEB9BCA32DA076-GSPRAUL]
Sent: 8/14/2020 5:57:42 PM
To: Kaiser, Sven-Erik [Kaiser.Sven-Erik@epa.gov]
Subject: draft telford response
Attachments: draft_response_telford_07-07-20.docx; incoming_telford_tmdl_06-08-20.pdf

Sven,

As discussed, please ask Tony about this draft response.

Greg Spraul
Senior Advisor for Congressional and Intergovernmental Affairs
Office of Water
U.S. Environmental Protection Agency
Direct: 202-564-0255

Message

From: Braschayko, Kelley [braschayko.kelley@epa.gov]
Sent: 9/3/2020 8:00:52 PM
To: Spraul, Greg [Spraul.Greg@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]
Subject: RE: For Dave Review: response to Telford (AX-20-000-5532)
Attachments: response_telford_09-03-20-yellow-copy.kb.docx

Greg, a couple of edits attached.

Kelley E. Braschayko
Program Analyst
Office of Water
U.S. Environmental Protection Agency
3311B WJC East Building
(202) 564-6239
Pronouns: she/her/hers

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Thursday, September 3, 2020 3:28 PM
To: Aguirre, Janita <Aguirre.Janita@epa.gov>; Braschayko, Kelley <braschayko.kelley@epa.gov>
Subject: For Dave Review: response to Telford (AX-20-000-5532)

Janita and Kelley,

As discussed at the OWOW biweekly and now approved by Anna, attached is the draft response to the June 8, 2020 incoming letter from Telford for Dave's review. I am also including the exchange of letters we had with Telford last year for reference. This very short response has been cleared by OGC and OWOW too. Please review yourselves to QA/QC. If you think we can move directly to signature, I am happy to create the signature PDF, but I thought Dave might have edits.

Thanks for your help!

Greg

Greg Spraul
Senior Advisor for Congressional and Intergovernmental Affairs
Office of Water
U.S. Environmental Protection Agency
Direct: 202-564-0255

Message

From: Wildeman, Anna [wildeman.anna@epa.gov]
Sent: 9/3/2020 5:08:46 PM
To: Spraul, Greg [Spraul.Greg@epa.gov]
CC: Aguirre, Janita [Aguirre.Janita@epa.gov]; Mejias, Melissa [mejias.melissa@epa.gov]
Subject: RE: Refresh - For review: short response to ltr from Telford (Indian creek TMDL)

Wow that was short. No edits.

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Wednesday, September 2, 2020 11:22 AM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>; Mejias, Melissa <mejias.melissa@epa.gov>
Subject: FW: Refresh - For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

Just putting this short letter for your review at the top of your inbox. OWOW may bring this up at their biweekly.

Happy to chat if you need more background beyond what's provided below.

From: Spraul, Greg
Sent: Thursday, August 27, 2020 1:47 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>; Mejias, Melissa <mejias.melissa@epa.gov>
Subject: Refresh - For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

We spoke about this issue on the phone a few weeks back. The Toomey request has been handled and now we need to respond to the incoming from Telford. See the brief draft response in Word for your review. Feel free to give me a call to discuss.

Thanks!
Greg
202-564-0255

From: Spraul, Greg
Sent: Tuesday, August 18, 2020 4:48 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: FW: For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

We spoke before about a request from Sen. Toomey's office for EPA to meet with Telford (related to the June 2020 incoming letter from Telford that requests a meeting with EPA) and the plan was to

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Please let me know if you have any edits to the response.

Thanks,
Greg

From: Spraul, Greg
Sent: Tuesday, July 07, 2020 4:51 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

Consistent with where things are with the Borough of Telford litigation, attached is a short response to the incoming letter we received from the Borough for your review.

Please let me know if you have any edits/additions.

Thanks,
Greg

From: Curtin, James <curtin.james@epa.gov>
Sent: Wednesday, July 01, 2020 5:08 PM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

I'm fine with the edits also. I don't think you need to

Ex. 5 AC/DP

Ex. 5 AC/DP

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Goodin, John
Sent: Wednesday, July 01, 2020 4:26 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

DELIBERATIVE

Thanks, Greg—I don't have any issues with the edits, but will defer to OGC, including on

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Note that the cc's were all on the incoming.

Jim?
Thanks,
John

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Wednesday, July 01, 2020 2:14 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

John – I took a look and had some suggested edits. Please let me know what you think.

From: Spraul, Greg
Sent: Wednesday, July 01, 2020 1:38 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

Thanks. This is in OW-IO review.

From: Goodin, John <Goodin.John@epa.gov>
Sent: Tuesday, June 30, 2020 1:54 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

DELIBERATIVE

Afternoon, Greg—apologies for any confusion in providing a response here. DOJ sent an email response to Telford's attorney, John Hall, two weeks ago, and as a result **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP) This draft was coordinated with OGC. I don't know where in CMS the incoming may have landed, so am providing this draft to you to help wrap this up.

Let me know if there is anything more you need from us or OGC.

Thanks,
John

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Tuesday, June 09, 2020 5:44 PM
To: Santell, Stephanie <Santell.Stephanie@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: FW: New Telford Letter

We should probably discuss the best approach to responding to this incoming.

From: Spraul, Greg
Sent: Tuesday, June 09, 2020 3:33 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Bertrand, Charlotte <Bertrand.Charlotte@epa.gov>; Fields, Jenifer <fields.jenifer@epa.gov>
Subject: New Telford Letter

Also including the previous correspondence.

Here is the opener:

Dear Administrator Wheeler:

On behalf of the citizens of Telford Borough, Pennsylvania, and those communities serviced by the Telford Borough Authority, I am writing to seek your intervention regarding the ongoing biased and abusive treatment we have received from EPA Region III and Headquarters staff regarding the imposition of Clean Water Act mandates for our watershed. These mandates have

Message

From: Lewicki, Chris [Lewicki.Chris@epa.gov]
Sent: 8/20/2020 3:24:42 PM
To: Spraul, Greg [Spraul.Greg@epa.gov]
Subject: For Greg: Hall/Telford v. EPA STATUS of EPA response to 1) letter to Administrator and 2) Toomey's inquiry

Hi Greg,

I am drafting a status of some recent 303d litigation. I need to send it up today.

Are the bullets below an accurate **summary** of where things stand with OCIR re: Telford/Hall/Indian Creek TMDL?

1. **Ex. 5 Deliberative Process (DP)**
2.

Thanks!

From: Curtin, James <curtin.james@epa.gov>
Sent: Tuesday, August 11, 2020 6:40 PM
To: Havard, James <Havard.James@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

I'd only add that I spoke to Greg Spraul this morning about the Sen. Toomey inquiry. Greg said **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP) If not, he has **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP) He said he'd check in with me before he does that, if indeed it is ever necessary.

I'm fine with the other two responses and have nothing to add. I believe we're still awaiting David F's OK on the Offer of Judgment response.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 11, 2020 6:15 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara

<schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Curtin, James <curtin.james@epa.gov>

Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

Tom – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response.

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey’s office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall’s “offer of judgment,” DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Monday, July 20, 2020 4:36 PM

To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>

Cc: Day, Christopher <Day.Christopher@epa.gov>

Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think **Ex. 5 Deliberative Process (DP)** Let me know if you receive anything. In the meantime, I'll draft a response. It may be **Ex. 5 Deliberative Process (DP)**

Sarah

From: Erin Thomas <ethomas@hall-associates.com>

Sent: Monday, July 20, 2020 10:29 AM

To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>

Cc: John Hall <jhall@hall-associates.com>; Jjacquette@timoneyknox.com

Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledged the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated "problematic" paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.
6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA's response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>
Sent: Wednesday, July 8, 2020 4:29 PM
To: Erin Thomas <ethomas@hall-associates.com>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA's response to your proposed "Offer of Judgment."

First, Rule 68(a) of the Federal Rules of Civil Procedure ("Offer of Judgment") states that "a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Telford is the plaintiff in this matter. It is not "a party defending against a claim." Your proposal is accordingly not an "Offer of Judgment" as contemplated by Rule 68.

Second, with respect to your assertion that your "Offer of Judgment" letter is "not subject to FRE 408," a party cannot unilaterally waive FRE 408. It is not a privilege; it's a rule of admissibility. That rule states that evidence of "furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim" is "not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." What is more, the rule you have incorrectly invoked, Rule 68, expressly states that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

Sarah A. Buckley
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, NE
Room 4.1126
Washington, DC 20002

sarah.buckley@usdoj.gov
Ph: (202) 616-7554

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas

Message

From: Kaiser, Sven-Erik [Kaiser.Sven-Erik@epa.gov]
Sent: 8/17/2020 7:42:57 PM
To: Spraul, Greg [Spraul.Greg@epa.gov]; Levine, Carolyn [Levine.Carolyn@epa.gov]; Skane, Elizabeth [Skane.Elizabeth@epa.gov]
Subject: Sen. Toomey and draft Telford response
Attachments: draft_response_telford_07-07-20.docx; incoming_telford_tmdl_06-08-20.pdf

OCIR is ok with the draft response (from Tony Frye). Don't need to **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) Please proceed and let us know if any questions. Thanks,
Sven

Sven-Erik Kaiser
U.S. EPA
Office of Congressional and Intergovernmental Relations
1200 Pennsylvania Ave., NW (1305A)
Washington, DC 20460
202-566-2753 (o)
Ex. 6 Personal Privacy (PP) (C)

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453A93AEB9BCA32DA076-GSPRAUL]
Sent: 9/17/2020 7:56:19 PM
To: Wildeman, Anna [wildeman.anna@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]
Subject: RE: Telford
Attachments: response_telford_09-03-20-yellow-copy.docx

Here you go.

From: Wildeman, Anna <wildeman.anna@epa.gov>
Sent: Thursday, September 17, 2020 3:53 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>; Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: Telford

Can you guys send me back the letter prepared for Dave's signature? There's an edit I need to make. Thanks

Anna Wildeman
Principal Deputy Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202-564-5700
Wildeman.Anna@epa.gov

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453A93AEB9BCA32DA076-GSPRAUL]
Sent: 9/3/2020 7:28:15 PM
To: Aguirre, Janita [Aguirre.Janita@epa.gov]; Braschayko, Kelley [braschayko.kelley@epa.gov]
Subject: For Dave Review: response to Telford (AX-20-000-5532)
Attachments: incoming_telford_tmdl_06-08-20.pdf; response_telford_05-30-19.pdf; incoming_telford_03-25-19.pdf; response_telford_09-03-20-yellow-copy.docx

Janita and Kelley,

As discussed at the OWOW biweekly and now approved by Anna, attached is the draft response to the June 8, 2020 incoming letter from Telford for Dave's review. I am also including the exchange of letters we had with Telford last year for reference. This very short response has been cleared by OGC and OWOW too. Please review yourselves to QA/QC. If you think we can move directly to signature, I am happy to create the signature PDF, but I thought Dave might have edits.

Thanks for your help!
Greg

Greg Spraul
Senior Advisor for Congressional and Intergovernmental Affairs
Office of Water
U.S. Environmental Protection Agency
Direct: 202-564-0255

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453A93AEB9BCA32DA076-GSPRAUL]
Sent: 9/2/2020 3:22:24 PM
To: Wildeman, Anna [wildeman.anna@epa.gov]
CC: Aguirre, Janita [Aguirre.Janita@epa.gov]; Mejias, Melissa [mejias.melissa@epa.gov]
Subject: FW: Refresh - For review: short response to ltr from Telford (Indian creek TMDL)
Attachments: draft_response_telford_07-07-20.docx; incoming_telford_tmdl_06-08-20.pdf; response_telford_05-30-19.pdf; incoming_telford_03-25-19.pdf

Anna,

Just putting this short letter for your review at the top of your inbox. OWOW may bring this up at their biweekly.

Happy to chat if you need more background beyond what's provided below.

From: Spraul, Greg
Sent: Thursday, August 27, 2020 1:47 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>; Mejias, Melissa <mejias.melissa@epa.gov>
Subject: Refresh - For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

We spoke about this issue on the phone a few weeks back. The Toomey request has been handled and now we need to respond to the incoming from Telford. See the brief draft response in Word for your review. Feel free to give me a call to discuss.

Thanks!
Greg
202-564-0255

From: Spraul, Greg
Sent: Tuesday, August 18, 2020 4:48 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: FW: For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

We spoke before about a request from Sen. Toomey's office for EPA to meet with Telford (related to the June 2020 incoming letter from Telford that requests a meeting with EPA) and the plan was to **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Please let me know if you have any edits to the response.

Thanks,
Greg

From: Spraul, Greg
Sent: Tuesday, July 07, 2020 4:51 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

Consistent with where things are with the Borough of Telford litigation, attached is a short response to the incoming letter we received from the Borough for your review.

Please let me know if you have any edits/additions.

Thanks,
Greg

From: Curtin, James <curtin.james@epa.gov>
Sent: Wednesday, July 01, 2020 5:08 PM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

I'm fine with the edits also. I don't think you need to

Ex. 5 AC/DP

Ex. 5 AC/DP

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Goodin, John
Sent: Wednesday, July 01, 2020 4:26 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

DELIBERATIVE

Thanks, Greg—I don't have any issues with the edits, but will defer to OGC, including on

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Note that the cc's were all on the incoming.

Jim?
Thanks,
John

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Wednesday, July 01, 2020 2:14 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

John – I took a look and had some suggested edits. Please let me know what you think.

From: Spraul, Greg
Sent: Wednesday, July 01, 2020 1:38 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

Thanks. This is in OW-IO review.

From: Goodin, John <Goodin.John@epa.gov>
Sent: Tuesday, June 30, 2020 1:54 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

DELIBERATIVE

Afternoon, Greg—apologies for any confusion in providing a response here. DOJ sent an email response to Telford's attorney, John Hall, two weeks ago, and as a result: Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP) This draft was coordinated with OGC. I don't know where in CMS the incoming may have landed, so am providing this draft to you to help wrap this up.

Let me know if there is anything more you need from us or OGC.

Thanks,
John

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Tuesday, June 09, 2020 5:44 PM
To: Santell, Stephanie <Santell.Stephanie@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: FW: New Telford Letter

We should probably discuss the best approach to responding to this incoming.

From: Spraul, Greg
Sent: Tuesday, June 09, 2020 3:33 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Bertrand, Charlotte <Bertrand.Charlotte@epa.gov>; Fields, Jenifer <fields.jenifer@epa.gov>
Subject: New Telford Letter

Also including the previous correspondence.

Here is the opener:

Dear Administrator Wheeler:

On behalf of the citizens of Telford Borough, Pennsylvania, and those communities serviced by the Telford Borough Authority, I am writing to seek your intervention regarding the ongoing biased and abusive treatment we have received from EPA Region III and Headquarters staff regarding the imposition of Clean Water Act mandates for our watershed. These mandates have

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453A93AEB9BCA32DA076-GSPRAUL]
Sent: 8/26/2020 8:35:13 PM
To: Fields, Wanda [Fields.Wanda@epa.gov]
Subject: FW: For review: short response to ltr from Telford (Indian creek TMDL)
Attachments: draft_response_telford_07-07-20.docx; incoming_telford_tmdl_06-08-20.pdf; response_telford_05-30-19.pdf; incoming_telford_03-25-19.pdf

From: Spraul, Greg
Sent: Tuesday, August 18, 2020 4:48 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: FW: For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

We spoke before about a request from Sen. Toomey's office for EPA to meet with Telford (related to the June 2020 incoming letter from Telford that requests a meeting with EPA) and the plan was to **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Please let me know if you have any edits to the response.

Thanks,
Greg

From: Spraul, Greg
Sent: Tuesday, July 07, 2020 4:51 PM
To: Wildeman, Anna <wildeman.anna@epa.gov>
Cc: Aguirre, Janita <Aguirre.Janita@epa.gov>
Subject: For review: short response to ltr from Telford (Indian creek TMDL)

Anna,

Consistent with where things are with the Borough of Telford litigation, attached is a short response to the incoming letter we received from the Borough for your review.

Please let me know if you have any edits/additions.

Thanks,
Greg

From: Curtin, James <curtin.james@epa.gov>
Sent: Wednesday, July 01, 2020 5:08 PM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

I'm fine with the edits also. I don't think

Ex. 5 AC/DP

Ex. 5 AC/DP

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Goodin, John
Sent: Wednesday, July 01, 2020 4:26 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

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Thanks, Greg—I don't have any issues with the edits, but will defer to OGC, including on

Ex. 5 AC/DP

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Subject: RE: New Telford Letter

John – I took a look and had some suggested edits. Please let me know what you think.

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Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>
Subject: RE: New Telford Letter

Thanks. This is in OW-IO review.

From: Goodin, John <Goodin.John@epa.gov>
Sent: Tuesday, June 30, 2020 1:54 PM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Santell, Stephanie <Santell.Stephanie@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James

<curtin.james@epa.gov>; Robiou, Grace <Robiou.Grace@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>

Subject: RE: New Telford Letter

DELIBERATIVE

Afternoon, Greg—apologies for any confusion in providing a response here. DOJ sent an email response to Telford's attorney, John Hall, two weeks ago, and as a result **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP) This draft was coordinated with OGC. I don't know where in CMS the incoming may have landed, so am providing this draft to you to help wrap this up.

Let me know if there is anything more you need from us or OGC.

Thanks,

John

From: Spraul, Greg <Spraul.Greg@epa.gov>

Sent: Tuesday, June 09, 2020 5:44 PM

To: Santell, Stephanie <Santell.Stephanie@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Havard, James <Havard.James@epa.gov>; Curtin, James <curtin.james@epa.gov>

Subject: FW: New Telford Letter

We should probably discuss the best approach to responding to this incoming.

From: Spraul, Greg

Sent: Tuesday, June 09, 2020 3:33 PM

To: Wildeman, Anna <wildeman.anna@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Bertrand, Charlotte <Bertrand.Charlotte@epa.gov>; Fields, Jenifer <fields.jenifer@epa.gov>

Subject: New Telford Letter

Also including the previous correspondence.

Here is the opener:

Dear Administrator Wheeler:

On behalf of the citizens of Telford Borough, Pennsylvania, and those communities serviced by the Telford Borough Authority, I am writing to seek your intervention regarding the ongoing biased and abusive treatment we have received from EPA Region III and Headquarters staff regarding the imposition of Clean Water Act mandates for our watershed. These mandates have

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453A93AEB9BCA32DA076-GSPRAUL]
Sent: 8/26/2020 8:33:02 PM
To: Fields, Wanda [Fields.Wanda@epa.gov]; Bravo, Antonio [Bravo.Antonio@epa.gov]
CC: Dickens, Sandy [Dickens.Sandy@epa.gov]; Edwards, Crystal [Edwards.Crystal@epa.gov]; WigginsLewis, Miriam [WigginsLewis.Miriam@epa.gov]; Zipf, Lynn [Zipf.Lynn@epa.gov]; Brown, Sineta [Brown.Sineta@epa.gov]; Knolton, Lashan [Knolton.Lashan@epa.gov]
Subject: RE: ACTION: outstanding Telford items

Wanda,

Let me forward you materials so you can update CMS.

From: Fields, Wanda <Fields.Wanda@epa.gov>
Sent: Wednesday, August 26, 2020 4:32 PM
To: Bravo, Antonio <Bravo.Antonio@epa.gov>
Cc: Dickens, Sandy <Dickens.Sandy@epa.gov>; Edwards, Crystal <Edwards.Crystal@epa.gov>; WigginsLewis, Miriam <WigginsLewis.Miriam@epa.gov>; Zipf, Lynn <Zipf.Lynn@epa.gov>; Brown, Sineta <Brown.Sineta@epa.gov>; Knolton, Lashan <Knolton.Lashan@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Subject: RE: ACTION: outstanding Telford items

Why is this not in CMS?

From: Bravo, Antonio <Bravo.Antonio@epa.gov>
Sent: Wednesday, August 26, 2020 4:24 PM
To: Fields, Wanda <Fields.Wanda@epa.gov>
Cc: Dickens, Sandy <Dickens.Sandy@epa.gov>; Edwards, Crystal <Edwards.Crystal@epa.gov>
Subject: FW: ACTION: outstanding Telford items

According to Greg Spraul, AX-20-000-5532 is with Anna for review.

Thanks.

Antonio

From: Spraul, Greg <Spraul.Greg@epa.gov>
Sent: Friday, August 21, 2020 10:59 AM
To: Wall, Tom <Wall.Tom@epa.gov>; Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Bravo, Antonio <Bravo.Antonio@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: ACTION: outstanding Telford items

This draft response is currently with Anna W for review.

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Friday, August 21, 2020 10:43 AM
To: Goodin, John <Goodin.John@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Bravo, Antonio <Bravo.Antonio@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: ACTION: outstanding Telford items

Thank you, good to know the latest. I think there is one more incoming that needs a response. This is AX-20-000-5532. I believe this is **Ex. 5 Deliberative Process (DP)**

A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

Tom Wall, Director
Watershed Restoration, Assessment and Protection Division
Office of Wetlands, Oceans and Watersheds
U.S. EPA
Wall.tom@epa.gov
202/564-4179

From: Goodin, John <Goodin.John@epa.gov>
Sent: Friday, August 21, 2020 10:23 AM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Santell, Stephanie <Santell.Stephanie@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

DELIBERATIVE

Thanks, Tom—Greg and I had a chance to catch up this morning and the current status is that OCIR took care of the Toomey inquiry and Anna has the draft DOJ response for review. Greg—please give a read below to double check that the info from Curtin is not updated from what they previously provided.

Copying Greg and Sandra here in case things move in my absence.
Thanks,
John

From: Wall, Tom <Wall.Tom@epa.gov>
Sent: Tuesday, August 18, 2020 6:36 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Havard, James <Havard.James@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment
Importance: High

Hi John, see below from Jim. Looks good. If you want to send to OW, you might change the “John” to “Ann”a and “Jim” to “John”

From: Havard, James <Havard.James@epa.gov>

Sent: Tuesday, August 18, 2020 6:32 PM

To: Wall, Tom <Wall.Tom@epa.gov>

Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Importance: High

Privileged – Tom, John also asked me about Telford when he called this afternoon. Here is the note I recommend you send John today. I edited to reflect David F’s review. Thanks! Jim

Privileged

John – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response. David F is comfortable with the draft response (see below).

This email will be about this offer of judgment, not the other items pending on Telford, which (as background per your request) include:

- 1) A June 8 letter from Telford to the Administrator (and a June 9 email to the Administrator forwarding the letter from Telford). Greg Spraul has the current draft response to the Telford letter, which currently reads:

Ex. 5 Deliberative Process (DP)

- 2) A June 23 communication from Senator Toomey’s office requesting that EPA meet with Telford.

On this request, Greg Spraul wrote on July to OWOW and OGC:

Ex. 5 AC/DP

Is there an existing document that would serve this purpose?

If not, who would be the best attorneys to give a history/overview?

Jim Curtin explained that he would look to see if anything was filed in litigation providing some of the history and timing. He forwarded his proposed document to Greg Spraul on Thursday of last week (see attached message).

Back to the offer of judgment. In response to Hall's "offer of judgment," DOJ has already responded that an offer of judgment is not a proper tool for this case – this is a tool available to defendants in certain cases; Telford is the plaintiff here. DOJ also explained that the proposal was not acceptable. Hall and Associates have now asked that DOJ/EPA reconsider the offer of judgment. DOJ, in consultation with OGC, would like to respond as follows:

Ex. 5 AC/DP

It looks like a reasonable response to me. Again, **Ex. 5 AC/DP**

Thanks! Jim

Message

From: Spraul, Greg [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FD1EA61F0BAA453A93AEB9BCA32DA076-GSPRAUL]
Sent: 8/20/2020 3:36:55 PM
To: Lewicki, Chris [Lewicki.Chris@epa.gov]
Subject: RE: For Greg: Hall/Telford v. EPA STATUS of EPA response to 1) letter to Administrator and 2) Toomey's inquiry

Chris – see edits below...

From: Lewicki, Chris <Lewicki.Chris@epa.gov>
Sent: Thursday, August 20, 2020 11:25 AM
To: Spraul, Greg <Spraul.Greg@epa.gov>
Subject: For Greg: Hall/Telford v. EPA STATUS of EPA response to 1) letter to Administrator and 2) Toomey's inquiry

Hi Greg,

I am drafting a status of some recent 303d litigation. I need to send it up today.

Are the bullets below an accurate **summary** of where things stand with OCIR re: Telford/Hall/Indian Creek TMDL?

1.

Ex. 5 Deliberative Process (DP)
- 2.

From: Curtin, James <curtin.james@epa.gov>
Sent: Tuesday, August 11, 2020 6:40 PM
To: Havard, James <Havard.James@epa.gov>; Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>
Subject: RE: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

I'd only add that I spoke to Greg Spraul this morning about the Sen. Toomey inquiry. Greg said Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)	<div style="border: 1px dashed black; padding: 5px; text-align: center;">Ex. 5 Deliberative Process (DP)</div>
Ex. 5 Deliberative Process (DP)	If not, he has <div style="border: 1px dashed black; padding: 5px; text-align: center;">Ex. 5 Deliberative Process (DP)</div> He said he'd check in with me before he does that, if indeed it is ever necessary.

I'm fine with the other two responses and have nothing to add. I believe we're still awaiting David F's OK on the Offer of Judgment response.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Havard, James <Havard.James@epa.gov>
Sent: Tuesday, August 11, 2020 6:15 PM
To: Wall, Tom <Wall.Tom@epa.gov>
Cc: Monschein, Eric <Monschein.Eric@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Curtin, James <curtin.james@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Privileged

Tom – Please see Jim C’s note below on an “Offer of Judgment” that had been sent to DOJ by Hall Associates (on behalf of Telford) in the Indian Creek nutrients TMDL matter. Jim asks if OW is comfortable with DOJ’s draft response.

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Ex. 5 AC/DP

This draft is also currently being reviewed by David F. It looks like a reasonable response.

Ex. 5 AC/DP

Thanks! Jim

From: Curtin, James <curtin.james@epa.gov>

Sent: Friday, August 07, 2020 3:34 PM

To: Havard, James <Havard.James@epa.gov>; Lewicki, Chris <Lewicki.Chris@epa.gov>; Schwartz, Sara <schwartz.sara@epa.gov>

Cc: McConkey, Diane <Mcconkey.Diane@epa.gov>

Subject: Telford v. EPA, Case No. 12-6548 - Draft DOJ (second) response to Offer of Judgment

Jim H,

Is OW Ok with DOJ sending the attached email to Hall & Associates? This email responds to Erin Thomas' July 20th email (below). Erin's email was a reply to DOJ's July 8th response/rejection of Hall & Associate's June 26th offer of judgment. The salient features of the O of J are the ten enumerated paragraphs in the email thread below.

Ex. 5 AC/DP

I'm simultaneously running this by David F and R3.

Thanks.

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
202-564-5482
William Jefferson Clinton North Rm. 7451

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Monday, July 20, 2020 4:36 PM

To: Curtin, James <curtin.james@epa.gov>; Gable, Kelly <Gable.Kelly@epa.gov>

Cc: Day, Christopher <Day.Christopher@epa.gov>
Subject: FW: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Jim and Kelly (and Chris for his records):

I think **Ex. 5 Deliberative Process (DP)**? Let me know if you receive anything. In the meantime, I'll draft a response. It may be **Ex. 5 Deliberative Process (DP)**

Sarah

From: Erin Thomas <ethomas@hall-associates.com>
Sent: Monday, July 20, 2020 10:29 AM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacqueline@timoneyknox.com
Subject: Re: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Sarah,

The response to our suggested resolution should be reconsidered as the legal conclusions presented in your email are significantly misplaced. The Act and NPDES rules nowhere proscribe EPA from agreeing to the suggested settlement statements. In fact, the position that EPA may not agree in advance to acceptable permit conditions is obviously false as I recently settled litigation with EPA/DOJ wherein EPA expressly agreed to the modified permit language that would be proposed to resolve the appeal. Moreover, as you know, EPA's proposed "settlement" was premised on EPA agreeing that the state could make certain alterations to the TMDL allocations that EPA would agree, *in advance*, were acceptable in NPDES permitting (i.e., how the WLA could be reapportioned between various point source categories). That is *precisely* the type of decision you now claim is illegal in a settlement context ("This we cannot do."). If fact, this routinely occurs in settling NPDES challenges and EPA's attorneys are surely knowledgeable of this fact. This lack of consistency in dealing with the parties who have filed appeals further underscores that the attorneys involved in this case are not acting in good faith and are bent on taking retaliatory actions against Telford via litigation costs. Moreover, refusing to allow or acknowledged the scope of even lawful TMDL changes, which the EPA attorneys admitted in the last call that the Commonwealth of Pennsylvania is allowed to implement, confirms this proposal was not fairly or objectively reviewed.

Our proposal, to our knowledge, nowhere specifically commits EPA to positions that are other than (1) general statements of proper TMDL/NPDES program implementation or (2) consistent with prior EPA nutrient criteria approval actions. Moreover, as noted in our correspondence, we stated that if EPA had a specific concern with any settlement item, we were open to discussion on that issue to ensure a statement that was amenable to both parties could be developed. Rather than discuss any "issue of concern," your email dismisses the proposed case resolution under the following claim, which bears no scrutiny:

EPA cannot commit to the substance of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

The enumerated “problematic” paragraphs are highlighted below in yellow with our response to your concern:

1. Confirm that, under the existing TMDL, the allowable POTW limit with the revised MS4 allocation suggested by EPA (Attachment 2) is 0.3 mg/l monthly average during the growing season. Attachment 3 presents the statistical basis for reaching this conclusion, regarding the allowable POTW monthly maximum effluent limits that may be set by PADEP, as consistent with the adopted 2008 TMDL.
2. Confirm that the facility may be authorized by PADEP to operate under a growing season monthly average interim limit of 0.5 mg/l for 10 years, which may be extended by PADEP for good cause.

Resp: Interim limits are routinely authorized in NPDES permits. Interim limits set no precedent on NPDES permit requirements nor do they change the applicable WLA derived from a TMDL. See NPDES Permit Writers Manual (2010) at 9-8, 9-9 (discussing availability of permitting compliance schedules and interim limits in NPDES permits).

3. Confirm that EPA did not establish the nutrient objectives in the 2008 TMDL based on the specific needs of Indian Creek, but rather on a “weight of evidence” assessment considering information from sources primarily outside of Indian Creek and the Commonwealth of Pennsylvania.
4. Confirm that DEP may choose to amend the TMDL based on an instream TP target ranging 0.06 - 0.10 mg/l (growing season average). EPA will acknowledge that this range of instream TP objectives is consistent with EPA nutrient criteria approvals in other states and nutrient criteria implementation guidance developed by PADEP, following the issuance of the 2008 TMDL.

Resp: This simply acknowledges that DEP may amend the endpoints consistent with prior EPA decisions on acceptable stream nutrient criteria and DEP’s subsequent guidance. That is how DEP is operating as we speak, and EPA has not objected to NPDES decisions using the updated procedures. This acknowledgement does not limit EPA’s consideration of new information, should it arise in the permit comment period.

5. Confirm that upon PADEP’s acceptance of a revised ambient target within the acceptable range and recalculation of the TMDL for the system, PADEP may establish revised MS4 and POTW effluent limitations consistent with the new thresholds of impairment.

6. Confirm that PADEP may authorize stream bank restoration to grant credit for TP reduction to the MS4 component and/or to address remediation of the ecological impairment of concern (*i.e.*, invertebrate impairment) and compliance with the applicable narrative criteria in lieu of further TP reduction under the TMDL.

Resp: This is a general statement of state authority for action consistent with a TMDL. Such credits have been allowed by EPA to address nutrient TMDL issues in dozens of cases in precisely this manner. These methods are used extensively in the Chesapeake Bay program.

7. Confirm that PADEP may amend and/or reallocate TMDL loads and determine that, based on stream sampling data taken during dry weather periods, MS4 loads are lower than determined in the 2008 TMDL and that a significant non-point source and/or natural load is originating from the ground water.

Resp: This simply confirms existing state authority that they already have in implementing the currently adopted TMDL. A reallocation of loading sources does not change the adopted TMDL.

8. Confirm that any component of the TMDL reasonably determined to be “natural” by PADEP does not require regulation under the Clean Water Act and may be considered in the selection of an appropriate ambient value to implement PADEP’s narrative criteria.

Resp: This general statement reflects the existing CWA scope of authority to regulate pollutants, EPA adopted NPDES, TMDL and WQS rules, as well as EPA WQS guidance in effect for over 30 years. See U.S. Env’tl. Prot. Agency, Office of Sci. and Tech., Establishing Site Specific Aquatic Life Criteria Equal to Natural Background 2 (1997); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 920-21 (11th Cir. 2007).

9. Confirm that a 15-year implementation schedule may be allowed for MS4 load reduction implementation and watershed restoration.

Resp: This is a common implementation schedule used by EPA and reflects the schedule EPA already indicated was acceptable in discussions with the parties.

10. Arrange a meeting with PADEP, EPA, and the affected communities to communicate and discuss the terms of this Offer of Judgment so all parties understand how the 2008 TMDL may be implemented and amended.

As you can see, the legal claim that these “issues” somehow violate CWA rules or statutory requirements is

simply false. Please reconsider the position stated. By separate cover we are seeking the analyses of these

issues which concluded, as a matter of law, that Telford has proposed an illegal resolution of the matter.

We look forward to EPA’s response and a further consideration of the proposal. Please arrange a meeting with

EPA Senior management to discuss resolution of the case as previously requested.

Regards,

Erin Thomas

From: Buckley, Sarah (ENRD) <Sarah.Buckley@usdoj.gov>

Sent: Wednesday, July 8, 2020 4:29 PM

To: Erin Thomas <ethomas@hall-associates.com>

Cc: John Hall <jhall@hall-associates.com>; JJacquette@timoneyknox.com <JJacquette@timoneyknox.com>

Subject: RE: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

FRE 408 – CONFIDENTIAL

Dear Erin,

This email serves as EPA’s response to your proposed “Offer of Judgment.”

First, Rule 68(a) of the Federal Rules of Civil Procedure (“Offer of Judgment”) states that “a party *defending against a claim* may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” Telford is the plaintiff in this matter. It is not “a party defending against a claim.” Your proposal is accordingly not an “Offer of Judgment” as contemplated by Rule 68.

Second, with respect to your assertion that your “Offer of Judgment” letter is “not subject to FRE 408,” a party cannot unilaterally waive FRE 408. It is not a privilege; it’s a rule of admissibility. That rule states that evidence of “furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise [a] claim” is “not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.” What is more, the rule you have incorrectly invoked, Rule 68, expressly states that “[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs.”

Finally, in response to the substance of your settlement offer, we are unable to accept this proposal. As you may know, EPA is not authorized to constrain its discretion with regard to the outcome of future agency actions. That is, in

settlement, EPA can commit to taking a particular action, perhaps by a date certain—for instance, proposing a discharge permit—but EPA cannot commit to the *substance* of that action—what that discharge permit will ultimately say. Points 2, 4, 6, 7, 8 and 9 in your letter would require EPA to commit to the outcome of its review of future PADEP permits and TMDLs. This we cannot do.

Best regards,
Sarah

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From: Erin Thomas <ethomas@hall-associates.com>
Sent: Friday, June 26, 2020 4:28 PM
To: Buckley, Sarah (ENRD) <SBuckley@ENRD.USDOJ.GOV>
Cc: John Hall <jhall@hall-associates.com>; Jacquette@timoneyknox.com
Subject: Telford v. EPA, Case No. 12-6548 - Offer of Judgment

Dear Ms. Buckley,

This email transmits to EPA (via DOJ) a proposed Offer of Judgment of the outstanding dispute, consistent with EPA's earlier suggested resolution of the matter.

The Offer of Judgment does not require EPA to alter, in any way, its 2008 TMDL decision – precisely as EPA has requested and sought to obtain through its filings in this matter.

Consistent with our correspondence and discussions, resolution does require EPA to acknowledge the various ways in which that TMDL may be amended by PADEP. It would also note EPA's agreement that TMDL amendments within a "range" of EPA-approved nutrient criteria for streams, would be considered acceptable and scientifically defensible by EPA for Indian Creek.

We look forward to your client's reaction to the proposed resolution of the matter.

Regards,

Erin Thomas